

A mixed legal system with a constitution on top: South African law in the era of democracy

by Carole Lewis

In 1994, with the advent of democracy in South Africa, the legal system then in force was left intact, but was turned upside down. A new, but interim, constitution was adopted (and replaced in 1996 with a final constitution) which made all law subordinate to the constitution, and introduced a Bill of Rights, entrenching certain fundamental human rights and the values of freedom, equality and dignity for all. The constitution is now the supreme law of the land and any law inconsistent with it has no effect. However, to understand the significance and effect of the constitution on the legal system formerly prevailing in SA one must have some appreciation of its origin and history.

We have a mixed legal system – an unusual blend of sources of law which apply as the accidental result of the history of the country and its constituent parts. The laws in force in 1994, some dating back to the Roman law of the sixth century AD, and to English law to a considerable extent when parts of the country were colonized, continue to apply now but subject of course to the constitution.

Roman-Dutch law in force in the seventeenth century was brought by the colonists of the Dutch East India Company to the Cape (of Good Hope) in 1653. At that time the law was already a mixture of the Roman law as it had been received in Europe in the middle ages, and of the law of the Germanic tribes who inhabited the Netherlands. The Roman law was that codified at the instance of the Emperor Justinian in the middle of the sixth century BC. The body of law received into South Africa was thus the Roman law, as a living system, with the commentaries and interpretation of several scholarly lawyers from Holland: Voet, De Groot, Van der Keessel *et al.*

When the English colonized the Cape various features of the English law were superimposed onto the Roman-Dutch law, and in several areas of the law English principles and rules predominated, some eventually incorporated by statute, as in the law of evidence and negotiable instruments and company law. By the turn of the nineteenth century the court systems, and both civil and

criminal procedure, were largely fashioned on the English model. It is no coincidence that some of the greatest judges of the era studied in England.

After the Anglo Boer war, when the various Republics and colonies unified to become the Union of South Africa in 1910, the mixed system of law was essentially settled. In so far as common law was concerned, Roman and Roman-Dutch law were still living sources of the law, as were many English principles, especially in the areas of commercial law, evidence and court procedures. (In the 1950s an attempt was made by a number of Afrikaans legal academics to “purify” the law of its English influence, and they had some effect on the courts, especially the very conservative, executive-minded Appellate Division of the sixties, seventies and eighties). Existing side by side with these European imports were systems of customary law applied by black people. In certain areas of the law, customary law was recognized by the state, in particular in family law and in succession. Superimposed on these systems was legislation governing black marriages, divorce and succession.

The Union adopted the so-called Westminster system of Government: a separation of powers, with Parliament being supreme. It was elected by white citizens throughout the country and also by coloured citizens in the Cape. Parliament consisted of a legislature (akin to the House of Commons) and a Senate and was, and still is, located in

Cape Town. The executive of Government was, and still is, in Pretoria, and the Appellate Division of the Supreme Court (now the Supreme Court of Appeal) was located in Bloemfontein – a small farming town in an arid and dusty part of the Orange Free State (a former Boer Republic named for the river that divided it from other areas. The Orange River itself was named after William of Orange). The location of the highest court of appeal was a function of political appeasement of the former republic.

Lawyers continued to be trained for the most part in England. When universities were established in South Africa, and legal degrees were recognized, that changed. The new route to becoming an advocate became the LLB, preceded by an undergraduate degree. English legal degrees were recognized until the 1960's, however. Attorneys – solicitors – qualified through a diploma and articles of clerkship. Many read for the LLB, however, and that became the standard route of qualification. The divided bar is still in place, though fusion is often spoken about.

With Union in 1910 one Supreme Court with provincial divisions in the four provinces was established: local divisions were added on in some of the bigger provinces. There were and are magistrates' courts throughout the country with both civil and criminal jurisdiction. When the final constitution was passed in 1996, the Supreme Court of South Africa was abolished and in its place were created high courts in the new provinces, and the SCA in the place of the former Appellate Division. The Constitutional Court, at the apex, was formally established in 1995. It is headed by a Chief Justice and 10 other judges, and is the final court of appeal in constitutional matters. It can exercise original jurisdiction in exceptional cases, and has recently done so, but in a matter where the substantive issues were already before the court on appeal in other related matters. The court sits only en banc.

Thus in the 80 or so years preceding the adoption of the interim constitution a blend of civil and common law rules were applied (our principle of *stare decisis* is the same as that in England), as of course did legislation. Parliament was supreme. It was not open to a court to question a statutory provision. So it was that apartheid flourished: Parliament, from the start of the twentieth century, introduced racial laws providing for discrimination in the workplace, and segregation in geographical areas, indeed in every sphere of life. And the courts were unable, and in the era of Nationalist party rule, often unwilling in any event, to challenge any statutory provision on the basis that it was discriminatory or unjust. So laws providing for detention without trial, or creating a host of criminal offences such as crossing racial barriers in one's personal life, could not legally be challenged.

The constitution, born out of a struggle against an iniquitous legal order, is now the supreme law of the land. And any law, whether of the common law or embodied in

a statute, passed before or after the advent of the constitution, may be challenged and pronounced invalid. The High Courts and the Supreme Court of Appeal have jurisdiction over constitutional matters, and may declare any law to be inconsistent with a principle or right in the constitution, and thus of no effect. If, however, a provision of a statute is declared invalid, that must be confirmed by the Constitutional Court. Appeals in respect of constitutional issues lie against the decisions of the High Courts and the Supreme Court of Appeal to the Constitutional Court.

The impact of a new constitutional order has had a profound effect on the lives of many. Not only are the rights to equality, freedom and dignity entrenched, but other rights – socio-economic rights – are given effect too: thus rights to education, to housing, to freedom of information, to administrative justice, to access to the courts, and to fair trial are protected in much the same way. In the field of criminal law, an accused person's right to silence has been entrenched and adumbrated; reverse onus provisions have been declared unconstitutional; the right to a fair trial without undue delay has been confirmed. In administrative law, the right to fair administrative action is now not only entrenched, but a Promotion of Administrative Justice Act (required by the constitution) regulates the rights of individuals against administrative bodies. The common law of delict (tort) has been particularly well-developed in a series of judgments in the Supreme Court of Appeal and in the Constitutional Court.

Employment law too has been developed, but less so perhaps than other fields because it had already been developed at the instance primarily of trades unions in the eighties and nineties. But the right to equality will undoubtedly have a marked effect in time to come. Indeed, equality courts are supposed to have been set up and considerable resources have been expended on training judicial officers for the purpose. As far as I know, though, they have not yet started operating, and my view is that all courts are required to consider matters of equality and there should be no special courts

Customary law remains in place: but there is a considerable tension in certain areas where rights such as equality and dignity are in conflict with customs, particularly in relation to the status of women. Polygyny is still practiced by certain people. The status of a polygynous marriage has yet to be tested against rights in the Bill. But early in October 2004 the Constitutional Court handed down a judgment declaring the African rule of primogeniture to be unconstitutional in the context of the law of succession, since it discriminates against women and extra-marital children: the court ordered that the law be applied so as to bring the customary principle in line with the values of equality and dignity, and that until there is legislative amendment to the statutes giving effect to the principle, deceased estates be administered in accordance with the precepts of fairness and justice.

When dealing with Islamic marriages, the courts have accorded rights formerly only accorded to those married under the common law, to people married by Islamic right: rights of succession, and to compensation for the death of a partner, have been recognized. Moreover, a partner in a same-sex union has been accorded the right to a dependant's action for loss of support; and the question whether there can be a marriage between same-sex partners is currently before the Supreme Court of Appeal, which heard the matter in September but has yet to hand down judgment.

Of particular interest is the horizontal applicability of the rights in the Bill. The rights are enforceable not only against the state but against other individuals too where appropriate. The full extent of horizontal application has yet to be seen. But recently, in cases of defamation (libel and slander), and in contractual matters, the courts have had little hesitation in invoking values underpinning the constitution in civil matters between private litigants. Of particular interest is the constitutional injunction in the Bill of Rights (s 39(2)) to develop the common law and customary law, and to interpret legislation, so as 'to promote the spirit, object and purport of the Bill of Rights'. There is at present much debate on the wisdom of allowing the courts supremacy over the legislature, and those who believe in a majoritarian democracy question the courts' ability to find that legislation – the expression

of the will of the people – is unenforceable. But it is a debate that cannot be entered into here.

The transformation of the legal system in the 10 years of democracy in South Africa has been a slow one. But it has also been steady. One of the ironies is that the system of Roman-Dutch law (really South African law since the early part of the twentieth century) lives very comfortably in a constitutional democracy. It was the legislation superimposed on the common law from the nineteenth century onwards, by both the Republics founded by the people originating in Europe, and by the English colonies, that formed the basis of apartheid. That basis was built upon by the Nationalist Government when it came to power in 1948 until a massive edifice of racist and oppressive laws was in place. What has been deconstructed now is essentially the legal edifice created in the twentieth century. The principles of public and private law, now freed from the shackles of racism and oppression, function effectively and fairly, subject to the constitution, in the twenty first century. ㊦

Carole Lewis

*Judge of the Supreme Court of Appeal, South Africa
Inns of Court and Institute of Advanced Legal Studies Fellow,
September–December 2004.*

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PROFESSOR MARIO SERIO

Professor of Comparative Law, Palermo University, Italy and Visiting Fellow, Institute of Advanced Legal Studies

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Barrister, 39 Essex Street, London

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Tuesday 10 May 2005, 6pm

PROFESSOR GILLIAN DOUGLAS

Professor of Law, Cardiff Law School, Cardiff University

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